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Supreme Court of the United States

OCTOBER TERM, 1963

No. 1009

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ARTHUR HAMM, JR., PETITIONER,

versus

CITY OF ROCK HILL, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

1. Was there any evidence of State action denying equal protection under the Fourteenth Amendment, which would invalidate petitioner's conviction of trespass laws relating to private business establishments?
2. Was there any denial of due process to petitioner under the Fourteenth Amendment by failing to require the prosecution, at the trial's outset, to elect as to the particular statute relied upon, where the court later, before submitting the case to the jury, restricted the charge to one designated statutory offense?

STATEMENT

Petitioner, a Negro, along with one Reverend C. A. Ivory, also a Negro, now deceased, entered a ten cent store in Rock Hill, South Carolina, on June 7, 1960. Ivory, a crippled person, was pushed in a wheel chair by petitioner. They made a purchase or two and then proceeded to the lunch counter, where petitioner seated himself. Service of food was sought, which was refused. They were then asked to leave by the store manager, and they refused to do so. Petitioner testified (R. 95) that the police requested the manager to ask him to leave. The police (R. 16, R. 26) testified that the manager asked him to leave on two occasions, and then the police asked him to leave before arresting him. The manager (R. 77 and R. 78) was explicit in his testimony that he was the first one to ask petitioner to leave. Petitioner was tried and convicted in Recorder's Court of trespass and sentenced to pay a fine of \$100.00 or serve thirty days. The conviction was affirmed by the Court of General Sessions on December 29, 1961, and by the Supreme Court of South Carolina on December 6, 1962. Rehearing was denied January 11, 1963. The decision of the Supreme Court of South Carolina is reported at 128 S. E. (2d) 907.

ARGUMENT

1. Was there any evidence of State action, denying equal protection under the Fourteenth Amendment, which would invalidate petitioner's conviction of trespass laws relating to private business establishments?

The City of Rock Hill has no ordinance requiring the segregation of the races in eating establishments. Consequently, the ruling of this Court in *Peterson v. City of Greenville*, May 20, 1963, that the enactment of such an ordinance is State action proscribed by the Fourteenth Amendment is not applicable here.

Neither is there any evidence of an official command or authoritative executive declaration such as was held to be State action in *Lombard v. State of Louisiana*, decided by this Court on May 20, 1963. On the contrary, it was brought out by petitioner's attorney (R. 72) from petitioner's own witness that there was no memorandum from the Police Department of the City of Rock Hill concerning racial segregation in eating establishments.

It is respectfully submitted that such racial discrimination as is shown here resulted from private action not prohibited by the Fourteenth Amendment. There is no manifestation of any prohibited State action.

2. Was there any denial of due process to petitioner under the Fourteenth Amendment by failing to require the prosecution, at the trial's outset, to elect as to the particular statute relied upon, where the Court later, before submitting the case to the jury, restricted the charge to one designated statutory offense?

Respondent respectfully submits that petitioner here argues only a question of a State court's determination of a procedural question. No attempt was made on appeal to the Supreme Court of South Carolina to argue a due process violation under the Fourteenth Amendment; consequently, it is unavailable to petitioner here. Rule 8, Section 2, of the Supreme Court of South Carolina provides as follows:

"Section 2. The Brief of Appellant shall be preceded by a statement of the questions involved.

"This statement of the questions involved must be set out in the briefest and most general terms. It should never exceed one page, unless the questions involved absolutely require it, and must always be printed on the first page of the Brief, without any other matter appearing thereon. Ordinarily, no point will be considered which is not set forth in the statement of the

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questions involved or suggested thereby." (Emphasis added.)

The question of due process not having been raised in the Supreme Court of South Carolina, or actually decided whether raised or not, the argument thereon cannot be considered by the Supreme Court of the United States. *Beck v. Washington*, 369 U. S. 541, 8 L. Ed. (2d) 98, 82 S. Ct. 955.

It is respectfully submitted that this due process question has not been properly raised, has not been decided by the Supreme Court of South Carolina, and cannot now be argued for the first time in the Supreme Court of the United States.

CONCLUSION.

It is respectfully submitted, for the foregoing reasons, that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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